

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

DONALD L. TRIMBLE,

Plaintiff,

vs.

**COMMISSIONER OF SOCIAL
SECURITY,**

Defendant.

8:18CV162

ORDER

This matter is before the Court on the Court's own motion. On August 10, 2018, Plaintiff Donald Trimble filed a Motion for an Order Reversing the Commissioner's Decision, ECF No. 16. On September 20, 2018, Defendant Commissioner of Social Security filed a Motion to Affirm Commissioner's Decision, ECF No. 17. One of Trimble's arguments is that the administrative law judge ("ALJ") that decided his case was an inferior officer not appointed in accordance with the Appointments Clause and, thus, the ALJ's decision should be vacated and the case remanded for a decision by a new constitutionally appointed ALJ. Pl. Br., ECF No. 16-1, Page ID 961. Defendant argues that because Trimble did not raise the issue at any point during the administrative process, either before the ALJ or Appeals Council, he has waived his Appointments Clause challenge. Def. Br., ECF No. 18, Page ID 991. Trimble argues that his Appointments Clause challenge may be timely presented for the first time on appeal, and that even if it is found to be untimely, the Court should exercise discretion to hear the challenge pursuant to *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991).

In *Thurman v. Comm'r*, No. 1:17-cv-35-LRR, 2018 WL 4300504, at *9 (N.D. Iowa Sept. 10, 2018), Thurman, like Trimble, “did not present her Appointments Clause challenge to the ALJ or the Appeals Council.” *Id.* The United States District Court for the Northern District of Iowa concluded that “Thurman’s Appointments Clause argument [was] waived.” *Id.* Thurman appealed and two of the issues this Court is being asked to decide in this case are presently before the U.S. Court of Appeals for the Eighth Circuit in *Thurman v. Comm'r*, No. 18-3451 (8th Cir. appeal docketed November 19, 2018). Therefore, this Court finds this matter should be held in abeyance pending a decision by the U.S. Court of Appeals for the Eighth Circuit in *Thurman v. Comm'r*, No. 18-3451.¹

Accordingly,

IT IS SO ORDERED:

1. The decision on Plaintiff’s Motion for an Order Reversing the Commissioner’s Decision, ECF No. 16, and Defendant’s Motion to Affirm Commissioner’s Decision ECF No. 17, will be held in abeyance pending the decision of the U.S. Court of Appeals for the Eighth Circuit in *Thurman v. Comm'r*, No. 18-3451; and
2. Counsel for Plaintiff shall notify the Court of the decision of the U.S. Court of Appeals for the Eighth Circuit in *Thurman v. Comm'r*, No. 18-3451, within 14 days of the decision. Upon such notification, the Court will enter an order lifting the stay and render a decision on the motions pending before this Court, ECF Nos. 16, 17.

¹ On January 30, 2019, the Eighth Circuit granted the Commissioner’s request for an extension on the brief deadline. The Commissioner’s brief is now due on March 27, 2019.

Dated this 8th day of February 2019.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge